

**STATE OF INDIANA  
BEFORE THE ALCOHOL AND TOBACCO COMMISSION**

<b>IN THE MATTER OF</b>	)	
<b>THE PERMIT OF</b>	)	
	)	
<b>The Avenue Bar Incorporated</b>	)	<b>Permit No. RR46-06205</b>
<b>d/b/a Avenue Bar</b>	)	
<b>617 Michigan Avenue</b>	)	
<b>LaPorte, IN 46350</b>	)	
	)	
<b>Permittee.</b>	)	

**PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

The Permittee, The Avenue Bar, Inc., d/b/a Avenue Bar, 617 Michigan Avenue, LaPorte, Indiana, 46350 (“Permittee”) is the holder of a type 210 Alcohol and Tobacco Commission (“ATC” or “Commission”) Permit No. RR46-06205 (the “Permit”). In 2009, Permittee filed its request for renewal and that application was assigned to the LaPorte County Local Board (“Local Board”) for hearing. The Local Board heard the renewal request on November 5, 2009, and on that same day, voted 4 – 0 to recommend denial of the application. The Commission adopted the recommendation of the Local Board on November 17, 2009, and denied the renewal application.

On November 17, 2009, the Permittee filed a timely Notice of Appeal and the matter was assigned to the Commission Hearing Judge, E. Edward Dunsmore (“Hearing Judge”). The Hearing Judge conducted a *de novo* hearing on September 28, 2010. At that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. The parties submitted Proposed Findings of Fact and Conclusions of Law for the Hearing Judge’s consideration on or before October 28, 2009. The Permittee was represented by attorney Jeffrey

L. McKean. The intervening remonstrators David Schmitt and Steve Strycker appeared in person and represented themselves. Intervening remonstrator Terry Scherer, Chief of Police for the City of LaPorte appeared in person and by attorney Donald E. Baugher. The Hearing Judge took judicial and administrative notices of the entire contents of the file in this matter. Having been duly advised of the facts and law at issue, including, but not limited to, the tape-recorded transcript of the Local Board hearing (“LB Hearing”), the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), and contents of the entire Commission File (“ATC File”), the Hearing Judge now tenders his Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

## **II. EVIDENCE SUBMITTED BEFORE THE LOCAL BOARD**

- A. The following individuals testified before the Local Board in favor of the Permittee in this cause:
  - 1. Kyle Kirkham (“Kirkham”), owner of Avenue Bar;
- B. The following exhibits were introduced and admitted before the Local Board in favor of the Permittee in this cause:
  - 1. None.
- C. The following individuals testified before the Local Board against the Applicant in this cause:
  - 1. David Schmitt (“Schmitt”), intervening remonstrator, business owner, and neighbor located near Avenue Bar.
  - 2. Terry Scherer (“Scherer”), intervening remonstrator, Chief of Police for the City of LaPorte.
  - 3. Steve Strycker (“Strycker”), intervening remonstrator, and business owner located near Avenue Bar.
  - 4. Willy Cains (“Cains”), Director of Code Enforcement for the City of LaPorte.
  - 5. Martin Foster (“Foster”), neighbor of Avenue Bar.

- D. The following exhibits were introduced and admitted before the Local Board against the Permittee in this cause:

1. Exhibits R1 through R7.

### **III. EVIDENCE SUBMITTED BEFORE THE COMMISSION**

- A. The following individuals testified before the Commission in favor of the Permittee in this cause:

1. Kyle Kirkham (“Kirkham”), owner of Avenue Bar.

- B. The following exhibits were introduced and admitted before the Commission in favor of the Permittee in this cause:

1. Exhibits P1 through P17.

- C. The following individuals testified before the Commission against the Permittee and in favor of the remonstrators in this cause:

1. David Schmitt (“Schmitt”), intervening remonstrator, business owner, and neighbor located near Avenue Bar.
2. Terry Scherer (“Scherer”), intervening remonstrator, Chief of Police for the City of LaPorte.
3. Steve Strycker (“Strycker”), intervening remonstrator, and business owner located near Avenue Bar.

- D. The following exhibits were introduced and admitted before the Commission against the Permittee in this cause:

1. Exhibits R8 and R9.

### **IV. FINDINGS OF FACT**

1. The Avenue Bar has been in operation at the same location in LaPorte for more than sixty (60) years.

2. Kirkham purchased the Avenue Bar in 2001 and initially held a Type 112 Two-Way Permit at this location.

3. Kirkham owns 100% of the stock in Avenue Bar.

4. In 2004, Permittee obtained approval to hold the current Type 210 ATC Permit for Avenue Bar.

5. Permittee annually filed renewal applications for the Permit which were approved through 2008.

6. No remonstrators ever appeared against the renewal of the Permit until the hearing on November 7, 2009.

7. Kirkham is a life-long resident of LaPorte.

8. Kirkham has no criminal record that would disqualify him from holding Permit.

9. Kirkham does not drink, does not smoke, and does not take illegal drugs.

10. Kirkham is a business owner, property owner, and taxpayer in the community.

11. Kirkham is 100% owner of AMK Enterprises, Inc. d/b/a Clay Street Pub which holds Type 112 ATC Permit No. RR46-94074 in LaPorte.

12. The Commission approved the renewal of the permit application for Clay Street Pub after November 2009.

13. Kirkham is 100% owner of AMK Enterprises, Inc. d/b/a OK Tavern which holds Type 112 ATC Permit No. RR46-00758 in LaPorte.

14. The Local Board had Kirkham appear in person with respect to the renewal of the permit for OK Tavern in February 2010. The Local Board approved the renewal application for OK Tavern.

15. Kirkham has made a substantial financial investment in Avenue Bar.

16. Avenue Bar employs residents of LaPorte County, pays taxes, and provides economic benefit to LaPorte County.

17. Avenue Bar does not have a significant, negative history of non-compliance with the Indiana State Excise Police.

18. Avenue Bar received no citations from 2001 to September 2007.

19. On September 5, 2007, Avenue Bar was cited for gaming machines and lack of minimum food requirements.

20. In 2007, it was not uncommon for taverns in LaPorte County to have gaming machines. Excise Officers had observed the gaming machines at Avenue Bar on many previous occasions and voiced no objection.

21. Avenue Bar was fined \$150 and required to remove the gaming machines.

22. On November 21, 2007, Avenue Bar was cited for excessive police runs to the establishment.

23. The Commission deferred any sanction against Avenue Bar resulting from the November 21, 2007, citation provided no similar citations were issued to Avenue Bar in the following year.

24. No similar citations were issued to Avenue Bar. Avenue Bar successfully completed the terms of the deferral. Therefore, the Commission imposed no fine or sanction against Avenue Bar from the November 21, 2007, citation.

25. On October 20, 2009, the Indiana State Police issued a citation against Avenue Bar for failing to maintain a high and fine reputation stemming from a sexual battery allegation that had been made against Kirkham based on an incident with Bridget Lowery ("Lowery") on September 6, 2009.

26. Kirkham denies any wrongdoing in the incident.

27. Excise Officer Michelle Traugher who sits on the Local Board indicated that the incident would not be considered by the Local Board because it involved a pending allegation without any adjudication.

28. Lowery is the mother of Kirkham's daughter.

29. Lowery has averred that she does not recall that any physical contact occurred between her and Kirkham on September 6, 2009.

30. Lowery stated that she did not wish to press charges from the incident.

31. The battery allegation against Kirkham remained pending against Kirkham as of the day of the appeal hearing. There has been no adjudication on that charge.

32. Since 2001, Avenue Bar has never had its alcoholic beverage permit suspended.

33. Since 2001, Avenue Bar has never had its alcoholic beverage permit revoked.

34. Avenue Bar has paid a total of \$150 in fines for Excise Police citations issued in the nine (9) years that Kirkham has operated the establishment.

35. The remonstrators introduced evidence of police runs to Avenue Bar.

36. The evidence demonstrated that not all of the police runs related to activity at the Avenue Bar.

37. None of the police runs involve any allegations of criminal activity against Kirkham or employees of Avenue Bar.

38. None of the police runs involve any allegations that Kirkham or any of the employees of Avenue Bar were engaging in acts involving battery, selling drugs, theft, prostitution, or other illegal acts.

39. Avenue Bar has never been cited for a noise ordinance violation.

40. City of LaPorte Code Enforcement Director Willy Cains testified that any time he asked Kirkham to clean something up or to do something with respect to the Avenue Bar, Kirkham has complied with his request and has done it in a timely manner.

41. The City of LaPorte has never cited Avenue Bar for any code enforcement violation and has never fined Avenue Bar.

42. Avenue Bar trains its employees on the responsible sale of alcoholic beverages.

43. Avenue Bar sends its employees to the Excise Police training classes.

44. Avenue Bar employees are licensed by the State of Indiana to serve alcoholic beverages.

45. Avenue Bar instructs its employees to not serve intoxicated individuals, to card for minors, and to maintain peace in the establishment.

46. Avenue Bar has a policy to ban patrons who are disruptive or cause trouble.

47. Avenue Bar presented affidavits, letters, and petitions from residents of the community that Kirkham and Avenue Bar have a reputation of good character and are held in high esteem in the community.

48. Among the reasons cited by the Local Board to recommend denial of the renewal of the Permit were that there was no need for the services, that the neighborhood and community did not desire the services, that the services would have a negative impact on other businesses in the neighborhood, and that the services would have a negative impact on the neighborhood in general.

## **V. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.

2. The Permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.
3. The Commission is authorized to act upon a proper application. *Id.*
4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a).
5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), 905 IAC 1-37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).
6. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).
7. The Permittee is the holder of a Type 210 ATC Permit, RR46-06205.
8. The Permittee was first issued the Permit in 2004. The Permit has been annually renewed thereafter.
9. The Commission has discretion to grant or refuse a Permit application. Ind. Code §§ 7.1-3-19-1, *et seq.*
10. The Commission is required to follow the recommendation of the Local Board when the Local Board votes to deny an application by a majority vote, unless the recommendation is arbitrary, capricious, contrary to a constitutional right, outside statutory jurisdiction, without observance of required procedures, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.



11. A renewal application may be denied for one of the following reasons: (1) the permittee does not maintain a high and fine reputation, and is not of good moral character and good repute in the community; (2) the permittee has allowed the licensed premises to become a public nuisance, or the scene of acts or conduct which are prohibited by the criminal laws of Indiana or the United States; (3) the permittee violates or refuses to comply with a provision or a rule or regulation of the Commission; (4) the permittee has ceased to possess any of the qualifications, including alteration or cessation of the particular business or type of business then engaged in, which qualifies him to hold that particular type of permit; or (5) the applicant has not fully disclosed the true facts in respect to the location of the permit premises for which the permit is applied. 905 IAC 1-27-1, 2, and 3.

12. The Commission may refuse to renew a permit if the owner, manager, or management of the establishment is not a person with a high and fine reputation for decency and law obedience in the community. Ind. Code § 7.1-3-9-10.

13. In its consideration of a renewal application, the Commission **cannot** consider: (1) the need for such services at the location of the permit; (2) the desire of the neighborhood or the community to receive such services; (3) the impact of such services on other business in the neighborhood or community; (4) the impact of such services on the neighborhood or community. 905 IAC 1-27-5.

14. In determining whether an applicant for renewal of a permit is of good moral character and good repute in the community, the Commission must consider whether the acts or conduct of the applicant would constitute actions or conduct prohibited by the Indiana Penal Code or criminal offenses under the laws of the United States. 905 IAC 1-27-1. The Commission may also consider the esteem in which the person is held by members of his

community, and such assessment of his character as may reasonably be inferred from police reports, evidence admitted in court and Commission proceedings, information contained in public records and other sources of information as permitted by Ind. Code § 7.1-3-19-18 and Ind. Code § 7.1-3-19-10. *Id.*; *Hanley v. E. Ind. Inv. Corp.*, 706 N.E.2d 576, 578 (Ind.Ct. App. 1999).

15. Police runs to an establishment are insufficient to show bad character unless it can be established that there is a nexus between the criminal conduct and the permittee's moral character. *Hanley*, 706 N.E.2d 576, 578.

16. Isolated incidents of excise police violations are insufficient to establish an inference that the permittee lacked good moral character or is not held in high esteem by the community. *Id.* at 579.

17. The elements for maintaining a public nuisance require that the permittee allows the licensed premises to become a public nuisance or be the scene of acts or conduct prohibited by the laws of the United States or Indiana. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656, 658 (Ind. App. 1992). "Allow" has been construed by Indiana courts to mean "concede, consent to, and to grant." *Id.* In light of such definition, the permittee must have direct or indirect knowledge of illegal activity on its premise. *Id.*

18. The Permittee contends the Local Board's decision not to renew the Permit was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.

19. An administrative agency action is arbitrary and capricious “where there is no reasonable basis for the action.” *Ind. Civil Rights Comm’n v. Delaware County Cir. Ct.*, 668 N.E.2d 1219, 1221 (Ind. 1996).

20. Substantial evidence is the standard to be applied by the Commission in review of the record of proceedings. Substantial evidence requires something more than a scintilla, and less than a preponderance of evidence; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656, 659 (Ind. App. 1992); see also *Roberts v. County of Allen*, 773 N.E.2d 850, 853 (Ind. App. 2002). Substantial evidence is more than speculation or conjecture. *Id.*

21. The Local Board impermissibly relied on the criteria found in 905 IAC 1-27-4 as a basis for denying the renewal of the Permit. Pursuant to 905 IAC 1-27-5, the Commission cannot consider the criteria found in 905 IAC 1-27-4 when making a recommendation with respect to a renewal application.

22. There is no pending citation against Permittee for maintaining a public nuisance and the Local Board did not indicate that it found that the business was a public nuisance.

23. The evidence in the record is insufficient to establish that Permittee allowed Avenue Bar to become a public nuisance in violation of 905 IAC 1-27-2.

24. The pending Excise Police citation for lack of a high and fine reputation was based on an allegation against Kirkham of an alleged battery that occurred on September 6, 2009. There has been no adjudication of that charge.

25. Excise Officer Traugher indicated that the battery allegation would not be considered by the Local Board because it remained pending and there had been no adjudication.

26. There is insufficient evidence to establish that Kirkham failed to maintain a high and fine character based on the alleged battery.

27. Kirkham continues to hold two other alcoholic beverage permits in LaPorte County. The Commission and Local Board have determined that Kirkham continues to maintain the requisite character and reputation to hold those permits. Specifically, the Local Board renewed the permit for AMK Enterprises, Inc. d/b/a OK Tavern with Kirkham present at a hearing in February 2010.

28. The police runs contain insufficient evidence of criminal allegations against Kirkham or employees of Avenue Bar that would establish that Permittee or Kirkham fail to maintain the requisite character and repute in the community to hold the Permit. 905 IAC 1-27-1.

29. Based upon review of the entire record, there is insufficient evidence to establish that Kirkham fails to maintain a high and fine reputation in the community or fails to have the requisite character to hold the Permit. 905 IAC 1-27-1.

30. The decision of the Local Board to deny the Permit was arbitrary and capricious and was not based upon substantial evidence.

31. Based upon the entire Record, Permittee's application to renew the Permit should be granted.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the recommendation of the Local Board to deny the renewal application of Permittee, The Avenue Bar, Inc., d/b/a Avenue Bar, 617 Michigan Avenue, LaPorte, Indiana, 46350, Permit No. RR46-06205, in this matter was arbitrary and capricious and unsupported by substantial evidence.

FURTHER, IT IS ORDERED, ADJUDGED, AND DECREED that the evidence presented in the entire record is insufficient to establish that Permittee maintains a public

nuisance or fails to possess the requisite character and reputation in the community to hold the Permit. The appeal of Permittee is GRANTED. The recommendation of the Local Board in this matter is OVERTURNED. The Permit renewal is hereby GRANTED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
E. Edward Dunsmore, Hearing Judge  
Alcohol and Tobacco Commission